REPLY BRIEF.

No. 125.

FEB 7 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Illinois.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

No attempt will be made to analyze and differentiate each of the numerous decisions contained in respondent's brief. There are 116 cases cited in this garbled maze of unrelated data submitted under the guise of a "brief."

Most of these cases as will be noted have no bearing on the question involved.

If this matter is as simple as respondent contends, then it is difficult to comprehend why a brief of 67 pages and the citation of 116 cases should be necessary.

At no place in its brief has counsel intelligently discussed the question of whether the Appellate Court in this instance was in error when it weighed the evidence and substituted its opinion for that of the jury.

At no point has it, nor can it successfully argue that the State of Illinois in the operation of its judicial system can deprive the litigant in its courts in actions under Federal Statutes of the right to an adjudication of his case in accord with the interpretations of this Court.

At no point does it attempt to refute that where state procedural statutes deprive a litigant of his rights to an adjudication of his case by federal standards, such statutes must yield.

No, none of these points are intelligently discussed nor is any refutation or analyzation of the authorities cited in petitioner's brief attempted.

Rather we are treated to a classical discussion of general Illinois and Federal procedure concerning the granting of new trial, the directing of verdicts and of judgments notwithstanding the verdict. The conclusion of respondent's counsel then being that the rule in such cases in both jurisdictions is the same.

This might conceivably have some bearing, if it were shown, that in Federal Employer & Safety Appliance Act cases, the rule was the same.

However, counsel studiously avoids reference to these cases and only briefly attempts to refute those controlling cases cited by petitioner in his brief.

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Actually in cases under the acts in question, no true Illinois rule can be determined as will be later noted.

The Federal rule is, of course, that laid down by this Court in its various decisions referred to in petitioner's brief herein.

If respondent would only understand that we are here dealing with a simple question, that is, the right of a litigant relying on a federal statute in a state court, then all the generalities relied upon by respondent would disappear. These are no doubt the result of either a miscomprehension of the question or a realization that to face the real issue would be ruinous to its cause.

In respondent's statement of the case, it characterizes certain statements made in petitioner's brief as being "wholly untrue" and "to create the false impression" (pages 14 and 15). This ill becomes counsel. One would think out of graciousness to a fellow attorney, counsel might at least have conceded a mistake might have occurred.

In regard to witness Elder's statement, counsel for petitioner was in error for it was respondent's witness Green rather than Elder who weighed 190 pounds and who stated he had experienced occasions when the retriever had tripped (Record page 61).

Counsel apologized for this error but would also point out that respondent's statement that Elder's testimony was "wholly untrue" (Respondent's Brief page 14) is likewise in error.

At page 58 of the Record, it is shown that Elder was asked about a previous question and answer made at the time of his deposition as follows:

"Q. Now you mentioned that you had experience with a trolley retriever when you had already pulled the retriever out or pulled the rope out of the retriever for the purpose of setting it, and then having it rewind on you, has that happened during the course of your time?

A. Yes, sir, they trip on you most any time."

In regard to the statement at page 15 of respondent's brief that petitioner created a "false impression" about the irregularity of backing the car in against the pole, respondent is mistaken. Respondent's own witness, Cecil Campbell (Record page 62) said in regard to the matter of backing the car in as follows:

"I don't remember the car I was on. I don't remember anything particular that morning other than Mr. Elder made the statement when I got in the car with reference to the effect that they had to back it in against the pole. That was not the normal manner of doing it."

The most pertinent consideration about the facts in this case is that although respondent had endeavored all along to contend that the retriever was not defective, it failed in any way to produce it or in any way to account for its whereabouts.

It knew Harsh was injured by this retriever on this car but it never offered an iota of evidence regarding the operation of the retriever or any evidence as to what became of it afterwards. Even the Appellate Court conceded this (Record, page 18).

The fact that the company was in the habit of furnishing defective retrievers, and that other employees suffered similar incidents with them, although happily without the serious injury herein involved, in no way alters respondent's liability but rather aggravates the situation.

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Counsel next contends the case fails to present a substantial Federal question.

It bases this contention mainly on the fact that this Court dismissed the case of Corcoran v. City of Chicago (311 U. S. 610, 373 Ill. 567).

From a procedural point the Corcoran case parallels the case at bar. But it is only in this respect that any analogy exists.

In the Corcoran case (311 U. S. 610, 373 Ill. 567), no federal right of action was in any wise asserted.

That case involved a suit against the City of Chicago for personal injuries caused by an alleged negligent condition of the streets within the City.

No Federal statute was in any way pled or relied upon. No cause of action in any way relating to a Federal statute was determined in that cause.

Counsel's argument that petitioner is precluded by the holding in that case completely overlooks the facts and circumstances in the case at bar. That is, this is a case under the Federal Safety Appliance Act over which this Court has not only the right but the duty to see that litigants in state courts are protected.

The jurisdiction of this Court in the present action is under 28 U. S. C. A., par. 1257 (3), because here petitioner relies upon a federal statute as the only basis for his recovery.

THE WRIT ISSUED TO THE PROPER COURT.

Respondent's contention that the writ in this cause erroneously issued to the Supreme Court of Illinois, rather than to the Appellate Court for the Fourth District is equally without merit.

First, this Court granted the Writ on the status of the original record then before it which contained the whole of the judicial proceeding in this cause prior to its coming to this Court. As will be later noted, the Court, under the status of that original record, could only have properly issued the writ to the Supreme Court of Illinois, as it did do.

Under the rules of this Court, respondent, at the time it filed its brief in opposition to the Writ, could have noted any objection it had to the jurisdiction of this Court to grant the Writ as requested.

This is specifically provided for by Rule 24 of this Court, which provides in part as follows:

> (Rule 24) 2. "No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

Granted, the word used is "may", and this not being mandatory, it could be argued that this rule does not intend to preclude the raising of the question at the time of filing a brief on the merits.

However, assuming that this is the intent, and knowing that the general law is, that a question of jurisdiction cannot ordinarily be waived, how does this avail respondent in presently urging the question?

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Under this court's rules and the present state of the record, not one iota, for the following reasons:

Rule 26 of this Court provides as follows:

"26. Designation of portions of the record to be printed.—1. Within twenty days after the court has entered an order granting a writ of certiorari, the petitioner shall file with the clerk a designation of the parts of the record the printing of which he thinks necessary for a consideration of the questions presented as set forth in his petition for writ of certiorari, or a designation of those parts the printing of which is considered unnecessary, whichever is more convenient, with proof of service on the respondent as prescribed by Rule 33. Insofar as any portion of the record has already been printed for the use of the court below, the designation shall so state, and shall indicate the number of printed copies of such portions that have been or can be furnished.

"2. Any respondent, within ten days after receipt of the designation filed by the petitioner, may file with the clerk a cross-designation of additional parts of the record the printing of which he deems material; and, if he shall not do so, he shall be held to have consented to a hearing on a printed record consisting of the parts designated by the petitioner. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk. The designations of the parts of the record to be printed will not be printed by the clerk with the record.

"3. Within the time allowed for filing a cross-designation, the parties may stipulate the parts of the record to be printed, whereupon only the parts so stipulated shall be printed by the clerk. If the designation in such stipulation shall differ from the desig-

nation already filed by the petitioner pursuant to paragraph 1 of this rule, then the designation in the stipulation shall prevail. The parties may also stipulate the inclusion in the printed record in this court of additional certified portions of the record below. The stipulations will not be printed as a part of the record.

"4. Rule 36 governs the printing and distribution of records.

"5. A motion to require the certification of additional parts of the record must be filed and served together with, and within the time allowed for filing, the cross-designation provided for in paragraph 2 of this rule. The clerk will not proceed under Rule 36 until the court has disposed of the motion.

"27. Stay pending review on certiorari.—Applications pursuant to 28 U. S. C. [F. C. A.] § 2101 (f) to a justice of this court will normally not be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51."

The purpose of this rule is evident. It seeks to alleviate this Court's being burdened with the whole bulk of the record after the writ has been granted, many parts thereof then not being pertinent to the questions specifically presented in the petition. Likewise, it is intended to curtail the unnecessary expense of printing portions of the record upon which neither party intends to rely in the later presentation of the case.

It will be noted that under Paragraph 1 of Rule 26, counsel for petitioner must designate to the Clerk the portions of the record for printing.

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"he thinks necessary for a consideration of the questions presented as set forth in his petition for writ of certiorari, or a designation of those parts, the printing of which is considered unnecessary, whichever is more convenient".

Counsel for petitioner in his petition for certiorari set forth only two questions, as follows: (See page 2 of the petition for the writ filed herein by petitioner.)

"Questions Presented for Review.

"1. Whether the state or Federal law governs the right of a state Appellate Court to set aside a jury's verdict, in an action under the 'Safety Appliance Act' (45 U. S. C. A., Secs. . . ., et seq.), as being contrary to the manifest weight of the evidence.

"2. Whether the Appellate Court was correct in holding that petitioner's evidence concerning the defect in the car in question was against the manifest weight of the evidence."

In compliance with the rules, counsel for petitioner designated that the portions of the record bearing on these two questions be printed. This was done and there is no argument made by respondent that the record does not properly show that everything necessary for the Court to consider these questions was so designated and printed. Petitioner has duly complied with the rules in this respect.

Thereupon, what was then the duty of respondent?

Paragraph 2 of Rule 26 specifically denotes its duty. That is,

"any respondent within ten days after receipt of the designation filed by the petitioner, may file with the clerk a cross designation of **additional parts of the record the printing of which he deems material.**" (Emphasis ours.)

In this instance respondent did ask for some additional portion of the record, but not for any portion thereof which would indicate to what court this writ should have issued, as will be hereafter noted.

As has been stated, Paragraph 2 of Rule 26 requires that the respondent may designate such additional part of the record as "he deems material."

What respondent deems material would, of course, be based on the points it wished to make in opposition to the writ. It failed in its original brief, in opposition to the writ, to, in any way, indicate that the question of the jurisdiction of this Court to issue the writ to the Supreme Court of Illinois would be in any wise questioned.

Petitioner has no reason to anticipate it would now do so. Respondent, and respondent alone, knew upon what it intended to rely and under the clear intent of the rules had the option, and in this instance, in view of its present contention, the duty to designate the portions of the record bearing upon the question of jurisdiction be printed for the examination of this Court.

Keep in mind it is not petitioner's contention that there has been a waiver of a jurisdictional question. Certainly, if one raising a jurisdictional question can point out in the record such a defect, then he should be able to do so at any stage of the proceeding.

However, in the present situation it is urged that counsel is estopped by its failure to present the record on this question, as required by the clear intent of the applicable rules.

The dilemma of counsel in this respect is aptly illustrated by its brief.

It states blandly that the writ here should have issued to the Appellate Court, because this Court has held (and,

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of course, it could only hold in these cases under the exact status of the record as presented therein) in other cases that the writ there was properly directed to the Appellate rather than the Supreme Court.

Here again, respondent is in conflict with the rules as a necessary result of its own error. It is certainly the intent of Rule 40 that where facts are suggested, or some question regarding the record is discussed, reference should be made to the appropriate pages of the record pertaining thereto.

Here, in its argument on this question of jurisdiction, at pages 25 through 28 of its brief, no reference is made to any portion of the record. Of course, respondent is unable to make such reference, because it failed to furnish, as required, the portions of the record pertaining thereto (these omitted portions for illustration will be later referred to).

Not only did counsel fail originally to designate the portions of the record upon which it now relies, but it failed in any way to secure a stipulation or to file a motion that additional parts of the record be agreed or certified, as it could have done under Paragraphs 3 and 5 of Rule 26 of this Court.

It may be, although petitioner of course would not be in a position to say, that respondent waited in raising this jurisdictional question through a misunderstanding of the Rules, and thought that if certain portions of the record were omitted, it could then raise such a question with impunity.

If such is the case, it is unfortunate, but on the whole it must be conceded that if respondent had such motives (and petitioner does not necessarily say it did) justice has resulted.

If the respondent's error resulted from a misunderstanding of the Rules or through inadvertence, then, of course, this is truly unfortunate, but as will be seen, had it printed the record on this point, as required of it, there would have been no merit in its contention.

To illustrate the disadvantage to which petitioner is placed by reason of respondent's failure to comply with the rules in this respect, brief reference will be made to the original record in this cause, which this Court had before it at the time of the granting of the writ.

An order of the Supreme Court of Illinois, which clearly distinguishes the status of this case from these cases referred to by respondent in its brief, will also be noted, because petitioner is certain that this Court, when it granted the writ, took cognizance of the peculiar status of record of this cause, as affected by this order, and properly issued the writ to the Supreme Court of Illinois, rather than to the Appellate Court, where respondent contends it should have issued.

Before doing this it might be well to note certain provisions of Illinois procedure involved in this cause, so the course of the judicial development of this case can be completely understood.

Rule 16 of the Appellate Court for the Fourth District of Illinois provides for a stay of the mandate of that Court until the Supreme Court determines the petition for leave to appeal upon the filing of an affidavit, indicating that a party intends to file a petition for leave to appeal within the time provided by law.

This procedure was followed in the instant case (See page 151 of the original Transcript of the Record filed with the Petition for Certiorari).

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Upon the filing of the Petition for Leave to Appeal in the Supreme Court, the original Record and the Appellate Court Record in the cause went to the Supreme Court. (See Paragraph 259.32, Chapter 110, Ill. Rev. Statutes.)

Where the Supreme Court of Illinois denied the Petition for Leave to Appeal, as it did in the instant case, the record and mandate of that Court, denying the petition, would have been returned to the Appellate Court for the Fourth District as a matter of course (as provided in Paragraph 259.32 of Chapter 110, Ill. Rev. Statutes) had not petitioner herein adopted a different procedure.

Had this situation occurred, then respondent would have been correct in its contention that the writ should properly have issued to the Appellate Court for the Fourth District.

However, in the instant case, petitioner obviated this situation by also staying the mandate of the Supreme Court of Illinois until this petition for a writ of certiorari was determined by this Court.

At pages 155 and 156 (of the Original Transcript of the Record filed herein) this clearly appears in the following order entered in the Supreme Court of Illinois:

"In the Supreme Court of Illinois.

No. 33132.

Wayne Harsh, Plaintiff-Appellee,

vs.

Illinois Terminal Railroad Company, a Corporation, Defendant-Appellant.

Order.

This cause coming on to be heard upon the petition and affidavit of plaintiff-appellee, and it appearing to

the undersigned Judge of the Supreme Court of Illinois in vacation that due notice of said motion has been given to the defendant-appellant, and the Court being fully advised in the premises and having approved a bond in the sum of $500.00 conditioned to pay any costs or damages sustained by defendant-appellant by virtue of this Order; it is, therefore, ordered, adjudged and decreed that the mandate of this Court be and hereby is stayed for the statutory period or such extension thereto as may be granted by the Supreme Court of the United States during which plaintiff-appellee may seek a writ of certiorari in said Supreme Court of the United States, and that said mandate be further stayed in the event of the granting of said writ to plaintiff-appellee until said cause shall have been duly adjudicated by said Supreme Court of the United States.

Enter: Ralph L. Maxwell, One of the Justices of the Supreme Court of Illinois."

Under Illinois procedure the filing of the mandate in the lower Court is a precedent to reinvesting that Court with jurisdiction (See Smith v. Stevens, 133 Ill. 183 at 187).

In the case at bar, both the mandate and the record in this cause remained in the Supreme Court of Illinois by virtue of its own order.

The Supreme Court specifically, with knowledge that a petition for certiorari was to be filed, elected to await the decision of this Court upon that petition before its mandate issued.

Under such a circumstance the Writ not only should, but must lie to the Supreme Court of Illinois.

The cases of Minneapolis, etc., Ry. Co. v. Rock, 279 U. S. 410, 73 L. ed. 766; Lilly v. Grand Trunk W. Ry. Co.,

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317 U. S. 481, 87 L. ed. 411; Chicago & N. W. Ry. Co. v. Margevich, 75 S. Ct. 84, 99 L. ed. (Adv. Sheet No. 1), p. 46; Emmick v. Baltimore & O. R. Co., 340 U. S. 831, 95 L. ed. 611; Killian v. Pennsylvania R. Co., 338 U. S. 819, 94 L. ed. 497; Cowher v. Pennsylvania R. Co., 338 U. S. 828, 94 L. ed. 503; Thomson v. Sevier, 317 U. S. 698, 87 L. ed. 558, and Helton v. Thomson, 316 U. S. 688, 86 L. ed. 1760, cited by respondent are not helpful or controlling in view of the status of this record as indicated. Only the Lilly and Rock cases actually involve actions where this Court allowed a certiorari to review a similar action. In neither the Lilly or Rock cases was there a stay of the mandate in the Supreme Court and the situation therefore differs.

In the remainder of the cases above cited, all the decisions of this Court indicate that the petitions there seeking certiorari to the lower Appellate Courts were denied.

Nor do any of the cases arising from other states relied upon by respondent govern the present case, because in none of those cases was it shown that the higher Court had stayed its mandate and awaited the holding of this Court.

This Court has repeatedly held that the Writ should issue to the Court having jurisdiction and where the record of the cause is found.

Of course, if the mandate of the higher Court has issued and the record and mandate have been returned to the lower Court, then the writ would properly issue to that Court.

This Court, in Hodges v. Snyder, 261 U. S. 600, passed upon this precise question and there definitely stated the writ would properly issue to the Court where the mandate had issued and record was found, saying at page 601:

"The defendants in error move to dismiss the writ of error or affirm the judgment.

The ground of the motion to dismiss is that there is want of jurisdiction because the writ is not directed to the supreme court of the state. It was sued out to review a final judgment of that court, reversing, on appeal, an order of the circuit court, and remanding the cause, with direction to vacate the same. Under the local practice the original papers, that had been transmitted to the Supreme Court as the record on the appeal, were remitted to the Circuit Court, with copies of the judgment and opinion of the Supreme Court (S. D. Rev. Code, 1919, Sec. 3170); no copy of such record being retained by the Supreme Court. The rule of practice has been long established that in such case, in order to bring up the record, which is essential to a review of the judgment of the Appellate Court, the writ of error is properly directed to the lower court in which the record is then found" (citing authority).

In the Sioux Remedy Co. v. Cape, 235 U. S. at page 197, in the footnote it said:

"at the time of the allowance of the present writ of error the record had been sent to the Circuit Court of Turner County and so the writ was directed to that Court" (citing authority).

In Thomsen v. Cayser, 243 U. S. 66, a situation analogous to the present case existed. At page 83 of that decision this Court said:

"Subsequently a petition for the writ of error was filed and allowed and all further proceedings upon the part of the defendant for the enforcement of the judgment were suspended until the final determination of this Court upon the writ of error in return to which

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the record was properly furnished" (citing authority).

In the instant case the Supreme Court of Illinois specifically stayed any further action in this cause pending the determination of the petition for a writ of certiorari in this Court and further provided that upon its being granted, and as it was in the specific case, the mandate was further stayed until this Court decided the cause.

The mandate of this Court must run to the Supreme Court of Illinois under these circumstances in order to have proper judicial continuity.

Since the jurisdiction and the original record were in the Supreme Court of Illinois and the Appellate Court for the Fourth District has not been reinvested with jurisdiction, the writ must properly run to the Supreme Court of Illinois to whom it was properly addressed and which court certified the record in this cause to this Court in obedience thereto.

In Polleys v. Black River Co., 113 U. S. 81, at 82, and Lee v. Johnson, 116 U. S. 40, at 49, it is held that where the mandate has issued and the record is in the lower court, then the Writ properly runs to that Court.

Here, however, no such situation existed and the Writ could only proceed to the Supreme Court of Illinois.

Logic alone will dictate that both the Writ and the ultimate mandate of this Court must be directed to the Supreme Court of Illinois.

If this Court after determination of this cause were to send its mandate to the Appellate Court rather than to the Supreme Court of Illinois, that Court would be at a loss to in any manner proceed in the cause in conformity with the directions of such mandate. For so far as the

Appellate Court of Illinois is concerned, this matter is still pending in the Supreme Court of Illinois. It has never received any mandate from that Court indicating the disposition of this cause. It legally is yet unaware of the decision made by the Supreme Court of Illinois on the petition for leave to appeal.

On this point it finally resolves that not only was it proper to send the writ of this Court to the Supreme Court of Illinois but under the status of the record it could not have properly gone elsewhere.

The foregoing properly illustrated that respondent had actually no justification for challenging the jurisdiction of this Court to issue the writ on the whole of the record. Perhaps this is the reason it failed to furnish the record as the rules required it to do.

THIS CAUSE IS GOVERNED BY THE DECISIONS OF THIS COURT.

The portion of respondent's brief related to the rules governing new trials, judgments notwithstanding the verdict and the power of the appellate court to remand this cause is in no wise related to the actual question presented.

The question of the rights of a litigant asserting a federal statutory ground as a basis for relief in a state court is the basic problem involved.

Particularly here, the question is what are such a litigant's rights, when he asserts same in an action under the Safety Appliance Act?

In such actions the construction given these claims by this Court are ultimately controlling (See petitioner's brief herein at pages 13-14).

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What may be the situation in other types of proceedings has no bearing, because here we are dealing with specific statutory remedies. The construction and effect to be given these remedies is one solely for the final determination of this Court.

This Court has precisely delineated the authority of state courts in the review of these cases. It specifically enjoins them from weighing the evidence and substituting their opinions for those of the triers of fact. (See cases at pages 19, 20, 21 of petitioner's brief.)

The fact that the procedural provisions of the Illinois law specifically permit state courts of review to proceed contrary to the holdings of this Court in reviewing these cases, means only that the State rule must yield in the necessity of harmony and the granted right of a litigant to receive federal protection in federal statutory actions in state courts (see authorities at pages 22 and 23 of petitioner's brief herein).

THE CONFUSION OF ILLINOIS DECISIONS COMPELS THE ATTENTION OF THIS COURT.

The urgent need of this Court to rectify the confusion present in the judicial determination of the various Illinois cases on this point is best illustrated by reference to them.

All variety of views are found. In the case at bar, as in the case of Parthan v. Elgin J. & E. Ry. Co., 325 Ill. App. 408, 60 N. E. 2d 464, the respective Appellate Courts held that the state rule or practice granting the right of the appellate court to weigh the evidence on review governed.

In the Parthan case the Appellate Court for the First District of Illinois specifically stated on this point:

"In Tennant v. Pekin Union Railway Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, relied upon by plaintiff, suit was filed in a Federal District Court and the case is, therefore, not applicable."

Holding to the correct rule and in direct contravention of the foregoing are the decisions in Nichell v. Baltimore & Ohio R. Co., 106 N. E. 2d 738, 347 Ill. App. 202, and one (decided by the very Court who decided the case at bar) of Grosse v. Terminal R. R. Ass'n. of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018. In the latter case it was specifically held that appellate courts could not weigh the evidence under controlling federal law.

To compound the confusion one then has the case of Mitchell v. L. & N. Ry. Co., 375 Ill. 545, 31 N. E. 2d 965, wherein the Supreme Court of Illinois reversed and remanded to the Appellate Court for the Fourth District of Illinois, an action under the act with general language to the effect that the Appellate Court could weigh the evidence.

However, when the Appellate Court received the case back and reviewed it after reversal (310 Ill. App. 563, 35 N. E. 2d 81), it didn't take the general language of the Supreme Court (which would ordinarily have been correct had not the case been under the Federal Employers' Act) literally, but rather applied the correct rule concerning its right to weigh the evidence and said, after conceding it was governed by the federal law in regard to the contention that the verdict was against the manifest weight of the evidence, at page 86 of the Northeastern Reporter:

"The federal courts have held that the fact that the verdict and the judgment are against the weight of the evidence, are not for the determination of an appellate court." (Citing authority.)

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This, the same Appellate Court which held it had such authority in the case at bar.

This creates a situation where if a litigant seeks the proper Illinois Appellate District, he can recover under a given situation and in another district under the exact same set of facts he cannot.

If he is unhappy enough to be in the Fourth Appellate Court District, his case may go either way, depending upon which authority that Court may rely, it having decided the question both ways.

If he gets to the Supreme Court of Illinois, he again may be subjected to either rule, but if he is treated as the plaintiff was in the case of Mitchell v. L. & N. Ry. Co., 375 Ill. 545, 31 N. E. 2d 965, the evidence will be weighed, because in that case the Supreme Court directed the Appellate Court to which the case was reversed to do so as was previously noted.

Such confusion cannot be permitted to exist. Claimants asserting federal rights in state courts are entitled to know what their rights are and what they can expect in their respective causes. This Court alone can remedy this circumstance. This cause presents a perfect situation for it to do so. For here the Appellate Court has specifically stated that it had the authority required to weigh the evidence.

The point that this Court cannot review the facts of this case is premised on the contention that no federal question is presented. This is, of course, not the case as has been indicated and further reply to this need not be made.

THE FEDERAL RULES OF PROCEDURE DO NOT APPLY TO THE STATE COURTS.

Respondent's argument that it was entitled to a physi examination of petitioner as provided by the Federal Ru of Civil Procedure, is wrong because of two incorr assumptions.

First, that the Federal Rules of Civil Procedure ap to state courts.

They specifically do not, by their own terms, and t Court in Rader v. Baltimore & Ohio R. Co., 108 Fed. 980, at 986, held contrary to respondent's contention as their application.

Secondly, that this Court would reverse this cause f a new trial and therefore permit such an examination.

It is respectfully submitted that this Court cannot r verse this cause for a new trial. When petitioner stru the remanding clause of the Appellate Court's decisi herein, this cause became final and appealable. The que tion of a new trial is no longer possible for either party.

The proper order here should be similar to that enter in Lily v. Grand Trunk W. Ry. Co., 317 U. S. 481, that i that "the judgment below is reversed and the cause r manded for further proceedings not inconsistent with t opinion."

The prayer of the petitioner that the judgment of t Supreme Court of Illinois be reversed may be an ina curacy although in effect this is what this Court does i such instance.

An order such as above mentioned sent by mandate this Court to the Supreme Court of Illinois (whose mandat is stayed, pending this Court's decision) can in turn b

transmitted to the Appellate Court by the mandate of the Illinois Supreme Court which will be in accordance with that of this Court.

In such a fashion proper continuity is established and actually a better mode of procedure results. It was for this reason that counsel stayed the mandate of the Supreme Court of Illinois and properly requested that the Writ be directed to that Court.

Respectfully submitted,

WAYNE HARSH, Petitioner,
By MORRIS B. CHAPMAN,
1936 Edison Avenue,
Granite City, Illinois,
Counsel for Petitioner.

APPENDIX.

Rule 16, Appellate Court, Fourth District of Illinois:

Mandates.

No mandate shall issue in any case until 15 days shall have elapsed from the time of the entry of the judgment, and if petition for rehearing is filed until 10 days after the petition is denied, unless the court, or a justice in vacation, shall otherwise order. No mandate shall issue on any final judgment rendered in this court from which it shall be competent for the Supreme Court to grant leave to appeal until the time for filing a petition for leave to appeal shall have expired if the party entitled to file the petition has filed with the clerk of this court within 5 days after the judgment shall have become final as provided in Section 75 (2) of the Civil Practice Act, S. H. A. ch. 110, § 199 (2), an affidavit of the party and his attorney with proof of service of a copy on the opposing party that the party in good faith intends to file a petition for leave to appeal within the time provided by law. If the petition is filed within the proper time, no mandate shall issue until the petition shall have been granted or refused. This court, or a justice in vacation, upon motion may provide otherwise, or stay the mandate upon such terms as shall be determined.

Subparagraph 1 of Rule 32 of the Supreme Court of Illinois (Ill. Revised Statutes, Chapter 110, para. 259.32):

259.32 (Supreme Court Rule 32). Leave to appeal from the Appellate to the Supreme Court. (1) The party applying for leave to appeal from an Appellate Court to the Supreme Court shall file a petition therefor in the Supreme Court, stating therein the reason and grounds of appeal.

The clerk of the Supreme Court shall thereupon tran
a certificate of such filing to the clerk of the Appe
Court who shall transmit to the clerk of the Supreme C
the same record which was transmitted to the Appe
Court, with a certified copy of the record of the Appe
Court appended thereto. In case the leave shall no
granted the record shall be returned forthwith to the c
of the Appellate Court.